Rehearings, Appeals, Rescissions, and Dissolutions

CHAPTER 7

In this chapter . . .

The court may issue a variety of orders pursuant to the Adoption Code. Those orders may be reviewed by the court that issued the order and by the Court of Appeals. Following appeal to the Court of Appeals, the Michigan Supreme Court may also review orders in adoption proceedings. This chapter details the statutes, court rules, and case law that govern motions for rehearing and appeals to the Court of Appeals.

During the course of an adoption proceeding, the FIA, a child placing agency, or the court or tribunal where the child is a permanent ward may make a determination regarding consent to an adoption. If the consent to adoption is denied by any of these parties, the petitioner for adoption may appeal this decision to the Family Division of the Circuit Court. Section 7.3(A) details the statutes, court rules, and case law governing the review.

Prior to an adoption, a prospective adoptive parent may make a request for adoption subsidies. The FIA is responsible for determining whether or not the prospective adoptive parent is eligible for adoption subsidies. If the prospective adoptive parent disagrees with the determination made by the

FIA, he or she may appeal the determination to the Family Division of the Circuit Court. Section 7.3(B) discusses the statutes, court rules, and case law governing the review of decisions regarding adoption subsidies.

During the period for filing an appeal or when an appeal is pending, a party may request a stay of the order. Section 7.5 discusses motions for a stay pending appeal.

If an adoption order is amended, annulled, or rescinded as a result of a rehearing or an appeal, the court must make a report to amend the adoptee's birth record. Section 7.6 discusses the reporting requirements to change a birth record.

7.1 Purposes of the Adoption Code

When reviewing an order that was issued pursuant to the Adoption Code, it is important to remember the purposes of the Adoption Code.

MCL 710.21a provides that the general purposes of the Adoption Code are the following:

> "(a) To provide that each adoptee in this state who needs adoption services receives those services.
>
> "(b) To provide procedures and services which will safeguard and promote the best interests of each adoptee* in need of adoption and which will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.
>
> "(c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time."

*MCL 710.22(f) defines "best interests of the adoptee." See Section 1.4 for a complete listing.

7.2 Rehearings

The Family Division of Circuit Court may grant a rehearing in order to review an order it has entered pursuant to the Adoption Code. MCL 710.64 provides:

> "(1) Upon the filing of a petition in court within 21 days after entry of any order under [the Adoption Code], and after due notice to all interested parties, the judge may grant a rehearing and may modify or set aside the order."

Orders that are entered pursuant to the Adoption Code include the following:

- Order terminating parental rights:

- following a release of parental rights (MCL 710.29(7)),* *See Section 2.1.
- following a consent to adoption (MCL 710.51(1)),* *See Section 2.6.
- following a putative father hearing under the Adoption Code (MCL 710.37 and 710.39),* or *See Section 2.12.
- pursuant to a step-parent adoption (MCL 710.51).* *See Section 2.13.

♦ Order on a petition for revocation of release MCL 710.29(10).* *See Section 2.2.

♦ Order on a motion to withdraw consent to adoption (MCL 710.51(3)).* *See Section 2.7.

♦ Order on a motion to determine if the withholding of consent was arbitrary and capricious (MCL 710.45(2)).* *See Section 2.9.

♦ Order on a petition for a hearing to identify the father and determine and terminate his rights pursuant to the Adoption Code (MCL 710.36(1)).* *See Section 3.4.

♦ Order following a review of a finding of unsuitability of prospective adoptive parents pursuant to MCL 710.23f(8).* *See Section 5.2(D).

♦ Order resolving a custody dispute after a temporary placement (MCL 710.23d).* *See Section 5.4.

♦ Order placing an adoptee (MCL 710.51).* *See Section 6.1.

♦ Order of adoption (MCL 710.56).* *See Section 6.4.

♦ Order denying adoption (MCL 710.62).* *See Section 6.4.

MCL 710.24a lists the "interested parties" for various hearings conducted under the Adoption Code. If a petition for rehearing is filed, the "interested parties" would be the same parties that were "interested parties" in the original action that resulted in the court issuing the order that the petitioner is now seeking to have reviewed.

> **Note:** In order to determine who the interested parties are in a rehearing, see the specific section of this Benchbook that discusses that order. Cross-references are provided above.

A. Procedure for Rehearings

Filing and Service. A party may seek rehearing pursuant to MCL 710.64(1) by timely filing a petition stating the basis for rehearing. MCR 3.806(A). A

petition for rehearing must be filed within 21 days after entry of an order. MCL 710.64(1). The petitioner must immediately give all interested parties notice of its filing in accordance with MCR 5.105. MCR 3.806(A).

MCR 5.105 governs the method and manner of service of a petition for rehearing. MCR 5.105(A) provides that service on an interested person may be made by personal service, by registered, certified or ordinary mail, or if the interested person's address or whereabouts are unknown, by publication pursuant to MCR 5.114(B).

Response. Any interested party may file a response to the petition for rehearing within seven days of the date of service of notice on the interested party. MCR 3.806(A).

Procedure and Standard for Determining Whether to Grant a Rehearing. MCR 3.806(B) provides: "The court must base a decision on whether to grant a rehearing on the record, the pleading filed, or a hearing on the petition. The court may grant a rehearing only for good cause. The reasons for its decision must be in writing or stated on the record."

MCR 2.613(A) provides:

> "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

MCR 2.613(A) is applicable to adoption proceedings pursuant to MCR 3.800.

Procedure if Rehearing Is Granted. If the court grants the rehearing, after notice, the court may:

- take new evidence on the record,
- affirm the prior decision in whole or in part,
- modify the prior decision, or
- vacate the prior decision in whole or in part. MCR 3.806(C).

The court must state the reasons for its action in writing or on the record. MCR 3.806(C) and MCL 710.63.

B. Case Law

1. "Mere Change of Mind" or "Change of Heart"

- ***In re Koroly*, 145 Mich App 79 (1985)**

It is not an abuse of discretion for the court to deny a petition to set aside an order terminating parental rights based upon a "change of heart." 145 Mich App at 87. In *Koroly*, the child's mother initially told the petitioner that he was not the child's father. However, prior to the child's birth, when she was filling out forms at the adoption agency, she indicated that he was the child's father. 145 Mich App at 84. The father was contacted by the adoption agency and signed a disclaimer of paternity. He indicated that even though the mother named him as the father, he did not believe he was the child's father. On the day the child was born, the father signed a form denying any interest in custody of the child and indicated on that form that he was not the child's father. The lower court terminated his parental rights based upon the disclaimers of paternity. 145 Mich App at 84-85. The putative father changed his mind and indicated that he thought he was the child's father, so he filed a motion for rehearing. The lower court granted a rehearing but denied the petition to set aside the termination order. The court indicated that the "mere changing of mind" was not sufficient to set aside the order terminating parental rights. The petitioner appealed. The Court of Appeals held that the lower court properly determined that a change of mind was not a sufficient reason to set aside the previous order and, therefore, the lower court did not abuse its discretion in failing to grant the petition. 145 Mich App at 87.

- ***In re Blankenship*, 165 Mich App 706 (1988)**

In *Blankenship*, the petitioners released their parental rights to their child for the purpose of adoption. At the time of the release, the lower court informed both parents that once a release was given a "mere change of mind" was not sufficient to set aside the release. 165 Mich App at 709-10. The petitioners indicated that they understood and continued with the release. The court terminated their parental rights. Shortly after, the petitioners filed a motion for rehearing and argued a change in circumstances. The petitioners indicated that the father had now obtained a part-time job and they were engaged to be married. 165 Mich App at 710-11. The lower court denied the petition for rehearing and indicated that the parties had merely changed their minds. 165 Mich App at 711. The Court of Appeals upheld the lower court's decision and stated:

> "After petitioners voluntarily released their child for adoption, they did not have an absolute right to revoke the release for a mere change of heart; the release could be set aside only in the sound discretion of the probate judge, based on the best interests of the child." 165 Mich App at 713.

- ***In re Burns*, 236 Mich App 291 (1999)**

*See Section 1.4 for information on the "best interests" of a child.

Where a petitioner's release was both knowing and voluntary and the petitioner sought rehearing on the specific ground of a change of heart, the family court properly relied on the best interests* of the child for guidance when determining whether to vacate petitioner's release. 236 Mich App at 292-93.

2. Fraud

- ***In re MacLoughlin*, 82 Mich App 301 (1978)**

In *MacLoughlin,* a child's putative father, appellant, did not attend the hearing on the petition to terminate his parental rights, and his parental rights were terminated. Subsequently, the child was adopted by his step-father. 82 Mich App at 304. Approximately three years after the order terminating his parental rights, the appellant filed a motion to set aside the termination order and stated that the order had been fraudulently obtained. 82 Mich at 304. The appellant argued that the allegations contained in the termination petition were false and that he had not appeared at the termination hearing because the child's mother told him that she was not proceeding with the action. 82 Mich App at 304. At the hearing in the lower court, the court listened to arguments but did not take any evidence. At the conclusion of arguments, the mother requested accelerated and summary judgment. 82 Mich App at 305. The lower court granted the mother's request for summary judgment. 82 Mich App at 306. The Court of Appeals remanded the case to the trial court for a hearing on the merits and stated:

> "Public policy does favor the certainty and permanence of probate court adoption orders. However, public policy does not favor the securing of such orders by fraud on the petitioner or upon the court. Since fraud upon both the petitioner and the court is alleged by the petitioner, it would appear that the court should at least hear the basis for these claims and inquire into their validity at an appropriate hearing rather than summarily forming a conclusion at this stage of the proceedings." 82 Mich App at 310.

- ***In re Kozak*, 92 Mich App 579 (1979)**

A putative father's rights to his son were terminated pursuant to MCL 710.39. The child's mother filed both a release of parental rights and a petition to terminate the parental rights of an unknown putative father so that the child could be placed for adoption. The mother claimed that she did not know the identity of the child's father. After a hearing, the court terminated her parental rights to the child as well as the parental rights of the unknown putative father. Approximately three months after the order of termination was entered, the father filed an acknowledgment of paternity and then filed for a hearing on custody and a stay of the adoption proceedings. The court denied the request for a hearing and indicated that the order terminating parental rights was *res judicata*. The Court of Appeals overturned the decision to deny a hearing and

indicated that to be *res judicata* the former adjudication must be between the same parties. Since the father was not a party to the original hearing, he was not barred from litigating the issue of termination of parental rights. The Court of Appeals stated that public policy does not favor the securing of orders by fraud, and the court should at least hear the basis for the claim of fraud. 92 Mich App at 583, quoting *MacLoughlin*, *supra*, 82 Mich App at 310. The Court of Appeals concluded that in cases of positive fraud, the trial court may consider a petition for rehearing outside of the 21-day time limit contained in MCL 710.64. 92 Mich App at 583.

- ***In re Neagos*, 176 Mich App 406 (1989)**

In *Neagos*, the mother of two children consented to their adoption. Four years later she filed a petition to set aside the adoption. The mother asserted three arguments. First, she argued that the adoptive parents had promised to allow her visitation with the children in exchange for her consent. Second, she claimed that her mental condition at the time of consent was "unsound." Her final claim was that she had not been fully informed of her legal rights at the time of the consent hearing. 176 Mich App at 408. The lower court found that it lacked jurisdiction to hear a petition for rehearing when the petition is filed outside of the 21-day time limit prescribed in MCL 710.64. The Court of Appeals affirmed the lower court's decision, stating:

> "We recognize that there is authority for the proposition that the power of equity includes the power to set aside an adoption where fraud at the time of adoption is shown, despite the lack of a statutory basis for revocation of an adoption. See *In re Leach*, 373 Mich 148; 128 NW2d 475 (1964). See also *In re Kozak*, 92 Mich App 579; 285 NW2d 378 (1979). In this case, however, we must agree with the probate court that there was an inadequate showing of fraud to justify reopening the matter on equitable grounds. The fraud which justifies equitable interference with a probate order must be fraud in obtaining the order and not merely constructive, but positive, fraud. *In re Kozak, supra,* p 583. Because Michigan courts are extremely reluctant to set aside adoptions, a case of significant fraud must be made out." 176 Mich App at 411-12.

- ***In re Curran*, 196 Mich App 380 (1992)**

In *Curran*, a mother released her parental rights to her son and then filed a petition for rehearing. The mother indicated that the release should be set aside because she was "pressured" to release her child for adoption. The lower court denied the request to set aside the order and indicated that the mother's release was voluntary. 196 Mich App at 382-83. The mother appealed. The Court of Appeals upheld the lower court's determination, finding that it is not an abuse of discretion for the trial court to deny a petition for rehearing without taking evidence regarding undue influence where the petitioner's claim is vague and unspecific and the transcript clearly shows that petitioner's release was voluntary. 196 Mich App at 384-85.

3. Due Process

- ***In re Myers*, 131 Mich App 160 (1983)**

In *Myers*, the appellant released his parental rights to three minor children. After the release, the appellant filed a motion to revoke his release, which was denied by the lower court. 131 Mich App at 162-63. The appellant filed an appeal claiming that the release and revocation procedures contained in the Adoption Code were unconstitutional and denied him access to the courts because of the time limits contained in the rehearing and revocation provisions. The Court of Appeals upheld the lower court's denial of relief, stating that "while the Due Process Clause of the Fourteenth Amendment does guarantee an opportunity to be heard, there is no due process right to a rehearing or even to appellate review." 131 Mich App at 165.

C. Stay of Proceedings

MCR 3.806(D) provides:

> "Pending a ruling on the petition for rehearing, the court may stay any order, or enter another order in the best interest* of the minor."

*See Section 1.4 for information on "best interests of the minor."

D. Court Determination After Rehearing

The court must enter an order with respect to the original hearing or rehearing of contested matters within 21 days after the termination of the hearing or rehearing. MCL 710.64(2).

If the court denies the petition, the court must state the reason for denial on the record or in writing. MCL 710.63.

7.3 Appeals to the Family Division of Circuit Court

During the course of an adoption proceeding, the FIA, a child placing agency, or the court or tribunal where the child is a permanent ward may make a determination regarding consent to an adoption. If the consent to adoption is denied by any of these parties, the petitioner for adoption may appeal this decision to the Family Division of the Circuit Court.

A. Consent to Adoption Withheld

If the petitioner for adoption is unable to obtain the consent of FIA, a child placing agency, or the court or tribunal where the child is a permanent ward, the petitioner may file a motion with the court. MCL 710.45(2) provides:

> "If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the

> petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. . . ."

The consent of the FIA or a child placing agency is necessary where the child has been released by the parent(s) or guardian to the FIA or the child placing agency. The FIA must also consent to the release where the child has been permanently committed to the custody of the FIA. MCL 710.43(1)(b) and (d).

The consent of the court or the tribal court becomes necessary when the court or tribal court having jurisdiction over the child has permanent custody of the child. MCL 710.43(1)(c).

If the court's consent to adoption was required, then the motion must be heard by a visiting judge. MCL 710.45(7).

1. Motion to Determine if Arbitrary and Capricious

MCL 710.45(2) provides:

> "If an adoption petitioner has been unable to obtain the consent required by [MCL 710.43(1)(b), (c), or (d)], the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. A motion under this subsection shall contain information regarding both of the following:
>
> > "(a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.
> >
> > "(b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious."

Typically, a motion filed pursuant to MCL 710.45(2) comes before the court when there are competing parties to the adoption. For example, MCI has permanent custody of a child and it consents to the child's adoption by the foster parents. During that same time period, the child's grandparents request consent to adopt, and the request is denied. In this situation, the grandparents may file a motion asking the court to determine whether the denial of consent was arbitrary and capricious.

The Michigan Supreme Court has defined "arbitrary" and "capricious" as:

> "Arbitrary is '[W]ithout adequate determining principle. . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.'"

> "Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.'" *Bundo v Walled Lake*, 395 Mich 679, 703, n17 (1976), citing the United States Supreme Court in *United States v Carmack*, 329 US 230, 243 (1946).

MCL 710.45(3) limits when a motion to determine if consent was arbitrarily and capriciously withheld may be filed. MCL 710.45(3) provides:

> "If consent has been given to another petitioner and if the child has been placed with that other petitioner pursuant to an order under [MCL 710.51, which governs placement of a child for adoption following termination of parental rights], a motion under this section shall not be brought after either of the following:
>
> > "(a) Fifty-six days following the entry of the order placing the child.
> >
> > "(b) Entry of an order of adoption."

*See Section 5.5 regarding the investigation required by MCL 710.46.

MCL 710.45(4) provides that upon the filing of a petition to adopt a child and a motion to determine if consent was arbitrarily and capriciously withheld, "the court may waive or modify the full investigation of the petition provided in [MCL 710.46].* The court shall decide the motion within 91 days after the filing of the motion unless good cause is shown."

If the court's consent to adoption was required, then the motion shall be heard by a visiting judge. MCL 710.45(7).

2. Standard of Proof

The petitioner must establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. MCL 710.45(5).

The Court of Appeals in *Kefgen v Davidson*, 241 Mich App 611, 625 (2000), stated:

> "'Clear and convincing evidence is defined as evidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted.' *In re Martin*, 450 Mich. 204, 227; 538 N.W.2d 399 (1995), quoting *In re Jobes*, 108 N.J. 394, 407-408; 529 A.2d 434 (1987); see *People v Williams*, 228 Mich. App. 546, 557-558; 580 N.W.2d 438 (1998).'"

3. Disposition

If the petitioner fails to demonstrate by clear and convincing evidence that the action was arbitrary and capricious, then the court *must* deny the motion and dismiss that petitioner's petition for adoption. MCL 710.45(5).

MCL 710.45(6) provides:

> "If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court may terminate the rights of the appropriate court, child placing agency, or [FIA] and may enter further orders in accordance with this chapter or [MCL 712A.18] as the court considers appropriate. In addition, the court may grant to the petitioner reimbursement for petitioner's cost of preparing, filing, and arguing the motion alleging the withholding of consent was arbitrary and capricious, including reasonable allowance for attorney fees."

When the court makes a determination regarding whether the denial of consent was arbitrary and capricious, the judge must not substitute his or her judgment for that of the person or agency withholding consent. *In re Cotton*, 208 Mich App 180, 184 (1994). In *Cotton*, the Court of Appeals provided the following:

> "The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the [court] to decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the 'correct' decision or whether the [judge] would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to

convincing the [court] that it should go ahead and enter a final order of adoption." 208 Mich App at 184.

B. Subsidy Determinations

"Support subsidy" is defined in MCL 400.115f(u) as "payment for support of a child who has been placed for adoption." The FIA is responsible for determining eligibility for support subsidies. MCL 400.115g(2).

This section focuses on the procedure to appeal an adoption subsidy determination. See Section 10.5 for information on subsidy determinations. See Appendix I for the "Michigan Adoption Subsidy Program Information Guide" prepared by the Michigan Family Independence Agency.

MCL 400.115k(1) provides that an adoptee, the adoptee's guardian, or the adoptive parent or parents may appeal a determination of the FIA regarding adoption subsidies. The adoptee and the adoptive parents must be notified by the FIA of their right to appeal the FIA's subsidy determination. MCL 400.115k(2).

1. Jurisdiction and Venue

MCL 710.23 provides that the Family Division of the Circuit Court has jurisdiction to hear appeals on adoption subsidies brought pursuant to MCL 400.115k.

If the adoptee is residing in Michigan, venue lies in the Family Division of the Circuit Court for the county in which the petition for adoption was filed or the county in which the adoptee is found. MCL 400.115k(1)(a) and MCL 24.303(2)(a).

If the adoptee is not residing in this state, venue lies in the Family Division of the Circuit Court for the county where the adoption petition was filed. MCL 400.115k(1)(b) and MCL 24.303(2)(b).

The appeal must be conducted according to the Administrative Procedures Act, MCL 24.301 et seq. MCL 400.115k(1).

2. Petition for Review

In order to appeal the final determination of the FIA regarding an adoption subsidy, the petitioner must file a petition for review. MCL 24.303(2).

MCL 24.303(3) requires that the petition for review contain a concise statement of:

"(a) The nature of the proceedings as to which review is sought.

"(b) The facts on which venue is based.

"(c) The grounds on which relief is sought.

"(d) The relief sought."

The petitioner must attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought. MCL 24.303(4).

3. Time Requirements

The time requirements for filing a petition for review are contained in MCL 24.304(1), which provides:

> "A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms."

After the petition is filed, the FIA is required to submit documentation to the court. MCL 24.304(2) provides:

> "Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record."

4. Review

MCL 24.304(3) provides:

> "The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs."

5. Additional Evidence Presented to the Agency

Additional evidence may be offered to the agency upon application to the court pursuant to MCL 24.305, which provides:

> "If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there

> were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record."

6. Standard of Review

In certain circumstances, the court may set aside the decision of the agency. MCL 24.306 provides:

> "(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> > "(a) In violation of the constitution or a statute.
> >
> > "(b) In excess of the statutory authority or jurisdiction of the agency.
> >
> > "(c) Made upon unlawful procedure resulting in material prejudice to a party.
> >
> > "(d) Not supported by competent, material and substantial evidence on the whole record.
> >
> > "(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
> >
> > "(f) Affected by other substantial and material error of law.
>
> "(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings."

When reviewing an administrative agency decision, the court must determine if the agency decision was supported by competent, material, and substantial evidence on the whole record. *Union Bank v First Michigan Bank and Trust Co,* 44 Mich App 83, 86-87 (1972), citing Const 1963, art 6, §28; *Viculin v Dep't of Civil Service,* 386 Mich 375 (1971); *Diepenhorst v General Electric Co*, 29 Mich App 651 (1971). The Court of Appeals in *Russo v Michigan Dep't of Licensing and Regulation,* 119 Mich App 624, 630-31 (1982), held:

> "The standard to be applied in reviewing the factual determinations of an administrative agency or board is whether the decision is supported by competent, material, and substantial

> evidence on the whole record. Const 1963, art 6, § 28; MCL 24.306; MSA 3.560(206). The 'substantial evidence test' has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence it may be substantially less than a preponderance of the evidence. *Soto v Director, Dep't of Social Services*, 73 Mich App 263, 271; 251 NW2d 292 (1977), citing *Ginsburg v Richardson*, 436 F2d 1146 (CA 3, 1971), cert den 402 U.S. 976; 91 S Ct 1680; 29 L Ed 2d 142 (1971), reh den 403 U.S. 912; 91 S Ct 2213; 29 L Ed 2d 690 (1971); *Tompkins v Dep't of Social Services*, 97 Mich App 218, 222; 293 NW2d 771 (1980). Great deference is given to findings of an administrative law judge. *Viculin v Dep't of Civil Service*, 386 Mich 375, 406; 192 NW2d 449 (1971); *Tompkins, supra.* Since the administrative law judge, as the trier of fact, has the opportunity to hear the testimony and view the witnesses, his or her decision will be upheld so long as it is supported by substantial evidence on the whole record. *Tompkins, supra*, 223."

The court shall not substitute its judgment for that of an administrative agency, where the administrative agency's decision is supported by the record. *Iams v Civil Service Commission*, 142 Mich App 682, 693 (1985).

7. Disposition by the Court

After the court reviews the decision of the agency, the court has the following options:

- remand to the agency for further proceedings,
- remand to the agency for the taking of additional evidence,
- affirm the agency decision, in whole or in part,
- reverse the agency decision, in whole or in part, or
- modify the agency decision. MCL 24.306(2).

7.4 Appeals to the Court of Appeals

Orders of the Family Division of the Circuit Court in adoption proceedings may be appealed to the Court of Appeals. MCL 710.65(1) provides:

> "A party aggrieved by an order that is entered by the court under [the Adoption Code], including an order entered after a rehearing, may appeal the order to the court of appeals as of right not later than 21 days after the order is entered by the court or not later than 21 days after a petition for a rehearing* is denied."

*See Section 7.2 for information on rehearings.

Orders that may be entered pursuant to the Adoption Code include the following:

- Order terminating parental rights:
  - following a release of parental rights (MCL 710.29(7)),*
  - following a consent to adoption (MCL 710.51(1)),*
  - following a putative father hearing under the Adoption Code (MCL 710.37 and 710.39),* or
  - pursuant to a step-parent adoption (MCL 710.51).*
- Order on a petition for revocation of release MCL 710.29(10).*
- Order on a motion to withdraw consent to adoption (MCL 710.51(3)).*
- Order on a motion to determine if the withholding of consent was arbitrary and capricious (MCL 710.45(2)).*
- Order on a petition for a hearing to identify the father and determine and terminate his rights pursuant to the Adoption Code (MCL 710.36(1)).*
- Order following a review of a finding of unsuitability of prospective adoptive parents pursuant to MCL 710.23f(8).*
- Order resolving a custody dispute after a temporary placement (MCL 710.23d).*
- Order placing an adoptee (MCL 710.51).*
- Order of adoption (MCL 710.56).*
- Order denying adoption (MCL 710.62).*
- Order on a rehearing (MCL 710.64).*

*See Section 2.1.
*See Section 2.6.
*See Section 2.12.
*See Section 2.13.
*See Section 2.2.
*See Section 2.7.
*See Section 2.9.
*See Section 3.4.
*See Section 5.2(D).
*See Section 5.4.
*See Section 6.1.
*See Section 6.4.
*See Section 6.4.
*See Section 7.2.

MCL 710.65(3) provides:

> "An appeal from an order entered under [the Adoption Code] shall be given priority in the court of appeals and shall take precedence over all other matters, except for other matters that are given priority by specific statutory provision or rule of the supreme court."

MCL 710.65(1) assigns an appeal by right to "[a] party aggrieved by an order" entered under the Adoption Code. In *In re Draime*, 356 Mich 368, 371 (1959), the Michigan Supreme Court held that petitioners whose petition for adoption was denied are "aggrieved parties." In *Draime*, Harry and Signa Lewis (petitioners) filed a petition to adopt Keith Draime. After a preliminary investigation, the court placed Keith with the petitioners. Keith remained in their care for approximately two years, at which time the court denied the adoption petition. 356 Mich at 371. The court indicated that the adoption was not in the best interests of Keith because the petitioners were not willing to adopt Keith's sister. 356 Mich at 370. The petitioners filed an appeal, which was dismissed by the trial court because the trial court found the petitioners were not an "aggrieved party." The Supreme Court held:

> "The petitioners for almost 2 years had in their possession the 3-year-old boy, and the fact that they prosecute an appeal to this Court to retain that possession is some indication that they are aggrieved by the order denying them the right to adopt the minor child. . . . In the instant case petitioners were adversely affected by the denial of the adoption order by the probate court. Petitioners were aggrieved parties within the meaning of section 36 and, therefore, had the right to appeal." 356 Mich at 371-72.

A. Procedure for an Appeal of Right

Subchapter 7.200 of the Michigan Court Rules governs appeals to the Court of Appeals. Pursuant to MCR 7.203(A)(2), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from the following:

> "(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule."

As noted above, MCL 710.65(1) established an appeal by right of orders entered pursuant to the Adoption Code, provided that certain time requirements are met.

B. Time Requirements

MCR 7.204(A)(1) provides:

> "An appeal of right in a civil action must be taken within
>
> > "(a) 21 days after entry of the judgment or order appealed from;
> >
> > "(b) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or

> a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period; or
>
> "(c) another time provided by law.
>
> "If a party in a civil action is entitled to the appointment of an attorney* and requests the appointment within 21 days after the final judgment or order, the 21-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 21 days after the decision on the motion."

*In general, there is no right to an attorney in adoption proceedings. However, if the adoption proceeding involves the involuntary termination of parental rights, the parent may be entitled to an attorney. See Section 2.11.

C. Special Requirements for the Claim of Appeal

MCR 7.204(B) provides that in order to vest the Court of Appeals with jurisdiction in an appeal of right, an appellant must file a claim of appeal and the entry fee with the clerk.

The form of the claim of appeal is governed by MCR 7.204(D). MCR 7.204(D)(3) states that "[i]f the case involves a contest as to the custody of a minor child, that fact must be stated in capital letters on the claim of appeal."

D. Special Requirements for Briefs

MCR 7.212(A)(1)(a) provides the appellant must file five copies of a brief with the Court of Appeals within:

> "(i) 28 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court, whichever is later, in a child custody case or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion."

A "custody case" is defined by MCR 7.202(6) as "a domestic relations case in which the custody of a minor child is an issue, an adoption case, or a case in which the juvenile division of probate court has entered an order terminating parental rights or an order of disposition removing a child from the child's home."

Within the time for filing the brief, one copy of the brief must be served on each party* and proof of that service must be filed with the Court of Appeals. MCR 7.212(A)(1)(b).

*See MCL 710.24a for the Adoption Code definition of "interested parties."

MCR 7.212(A)(2)(a) provides that the appellee must file five copies of a brief with the Court of Appeals within the following time limits:

> "(i) 21 days after the appellant's brief is served on the appellee, in an interlocutory criminal appeal or a child custody case. This time may be extended only by the Court of Appeals on motion."

Within the time for filing the appellee's brief, one copy of the brief must be served on all other parties and proof of that service must be filed with the Court of Appeals. MCR 7.212(A)(2)(b).

If the time for filing an appeal of right has expired, a party may file an application for leave to appeal. MCR 7.203(B)(5). See Section 7.4(F).

E. Standard of Review

The standard of review for an appeal of an order denying a petition for rehearing to revoke a release for adoption is whether the court abused its discretion. *In re Kenneth Jackson, Jr*, 115 Mich App 40, 54 (1982).

In *In re Kyung Won Kim*, 72 Mich App 85, 89 (1976), the Court of Appeals provided the following definition of "abuse of discretion":

> "'Our prior decisions sharply limit appellate review of a trial court's valid exercise of discretion: 'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Wendel v Swanberg,* 384 Mich 468, 475–476; 185 NW2d 348 (1971), quoting *Spalding v Spalding*, 355 Mich 382, 384-85; 94 NW2d 810 (1959).'"

"A [judge] has discretion to grant or deny an adoption petition and this Court will not substitute its judgment for the trial court's unless there has been a clear abuse of that discretion." *In re Robins*, 153 Mich App 484, 488 (1986).

F. Application for Leave to Appeal

If the time for filing an appeal of right has expired, a party may file an application for leave to appeal. MCR 7.203(B)(5). The application for leave to appeal is also a late appeal, because it was not filed within 21 days of the order that is being appealed. MCR 7.205(F) governs applications for leave to appeal. MCR 7.205(F) provides the following restrictions:

- If the application for leave to appeal is filed more than 12 months after entry of the order or judgment on the merits, leave to appeal may not be granted. MCR 7.205(F)(3).

- The time limit for late appeals from orders terminating parental rights is 63 days. MCR 7.205(F)(5). See also MCR 3.993(C)(2), which provides:

  > "The Court of Appeals may not grant an application for leave to appeal an order of the family division of the circuit court terminating parental rights if filed more than 63 days after entry of an order of judgment on the merits, or if filed more than 63 days after entry of an order denying reconsideration or rehearing."

See MCR 7.205 for the requirements of an application for leave to appeal. For information on appeals to the Supreme Court, see Section 7.7.

7.5 Stay of Order Pending Appeal

MCL 710.65(2) provides:

> "An order of the court entered under [the Adoption Code] shall not be stayed pending appeal unless ordered by the court of appeals upon motion for good cause shown and on such terms as are deemed just."

Motions filed in the Court of Appeals are governed by MCR 7.211. Motions in the Court of Appeals for a stay of proceedings pending the appeal are governed by MCR 7.209.

7.6 Reporting Amended, Annulled, or Rescinded Adoption Orders

If the court reviews an adoption order and amends, annuls, or rescinds the order of adoption, the court must prepare a report to amend the birth record of the adoptee. MCL 333.2829(2) provides:

*See Section 7.8 for information on rescission of an adoption.

> "When an adoption order is amended, annulled, or rescinded, the court shall prepare a report which shall include the facts necessary to identify the original adoption report and the facts amended in the adoption order necessary to properly amend the birth record. The report of a rescission* of adoption shall include the current names and addresses of the petitioners."

Each month, the probate register or clerk of the court (county clerk) is responsible for forwarding the reports of adoption orders, amendments, annulments, and rescissions of adoption orders to the appropriate registration authority. MCL 333.2829(3) provides:

"Not later than the tenth day of the calendar month, the probate register or clerk shall forward:

> "(a) To the state registrar, reports of adoption orders, and amendments, annulments, and rescissions of the orders, entered during the preceding month for individuals born in this state.
>
> "(b) To the appropriate registration authority in another state, the United States department of state, or the United States immigration and naturalization service, reports of adoption orders, and amendments, annulments, and rescissions of the orders, entered during the preceding month for individuals born outside this state."

7.7 Appeals to the Supreme Court

An application for leave to appeal to the Supreme Court may be taken from a case pending in the Court of Appeals or after a decision by the Court of Appeals. MCR 7.301(A)(2). If the application is filed before the Court of Appeals' decision, the application must be filed within 42 days of one of the following:

"(a) after a claim of appeal is filed in the Court of Appeals;

"(b) after an application for leave to appeal is filed in the Court of Appeals; or

"(c) after entry of an order by the Court of Appeals granting an application for leave to appeal."

If the case is not pending before the Court of Appeals, then the application for leave to appeal is governed by MCR 7.302(C)(2)–(4). MCR 7.302(C)(2) provides:

"(2) Other Appeals. Except as provided in subrule (C)(4), in other appeals the application must be filed within 42 days in civil cases, or within 56 days in criminal cases:

> (a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals.
>
> (b) after the filing of the opinion appealed from; or
>
> (c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

> "However, the time limit is 28 days where the appeal is from an order terminating parental rights."

MCR 7.302(C)(4) provides that if the Court of Appeals remands the case to a lower court for further proceedings, the application for leave may be filed within 42 days, in civil cases, after one of the following:

> "(a) the Court of Appeals decision ordering the remand, or
>
> "(b) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question."

Applications that do not meet the above requirements will not be accepted. MCR 7.302(C)(3).

7.8 Rescission of Step-Parent Adoption

A. Petition Requirements

MCL 710.66(1) provides:

> "(1) If an adult adoptee who was adopted by a stepparent and the adult adoptee's parent whose rights have been terminated desire to rescind the adoption by the stepparent and restore the parental rights of that parent, they shall file a rescission petition with the court of the county in which the adoption by the stepparent was confirmed. This section applies to an adult adoptee who was adopted by a stepparent regardless of whether the adoptee was a minor at the time of adoption."

A rescission petition must be verified by the adult adoptee and the parent whose rights were terminated. The rescission petition must also contain all of the following information:

- the present name of each petitioner,
- the name of the adoptee at the time of birth and immediately after an adoption if different from the adoptee's present name,
- the name of the parent at the time of termination of parental rights,
- the date and place of the adoptee's birth,
- the present residence of each petitioner,

- the name, date and place of birth, and address of the parent whose rights were not terminated and whose spouse adopted the adoptee, if known to either of the petitioners,
- the name of the step-parent at the time of the order of adoption, including the maiden name of the step-parent if applicable and if known, and the step-parent's date and place of birth. MCL 710.66(2)(a)–(c).

See Appendix B for the SCAO form "Petition for Rescission of Adoption and Order."

Prior to the hearing on the petition, the petitioners must file a copy of the adoptee's new birth certificate if a new certificate was issued by the Department of Public Health.* The birth certificate may be filed at the same time as the rescission petition or subsequent to the filing of the petition; however, it must be filed prior to the hearing on the petition. MCL 710.66(3).

*See Section 6.5 for more information on new birth certificates.

B. Hearing Requirements

The court must conduct a hearing after notice has been served on the interested parties. MCL 710.66(4).

MCL 710.24a(4) provides that the interested parties in a rescission petition are the following:

- the petitioners,
- the step-parent who adopted the adult adoptee, and
- the spouse of the parent whose rights were terminated.

The court may order an investigation by an employee or agent of the court and may enter an order of rescission of the adoption that restores the parental rights of the parent who filed the petition. MCL 710.66(4).

Certified copies of a rescission order must be given to each petitioner. A copy of the order must be sent to the Department of Public Health. A report of adoption must also be forwarded to the Department of Public Health as required by MCL 333.2829. MCL 710.66(5). For more information on a report of adoption, see Section 6.5(B).

C. Effect of Rescission

The rescission of the adoption is effective from the date of the order of rescission. MCL 710.66(4).

MCL 710.66(6) provides:

> "After entry of an order of rescission, the adult adoptee becomes an heir at law of the parent whose parental rights have been restored and of the lineal and collateral kindred of that parent. After entry of the order of rescission, the adult adoptee is no longer an heir at law of a person who was his or her stepparent at the time of the order of rescission or an heir at law of the lineal or collateral kindred of that person, except that a right, title, or interest vesting before entry of the order of rescission shall not be divested by that order."

7.9 Dissolution of an Adoption

*See Section 7.8 for information on rescission of a step-parent adoption.

The Adoption Code does not provide for dissolution of an adoption. However, courts may be asked to dissolve an adoption. Some courts have allowed adoptive parents to release the adoptee for adoption, which effectively dissolves the adoption. However, it is important to note that when an adoptive parent releases, the previous parents' rights are not reinstated as they would be in a step-parent rescission.* The adoptee is essentially left without parents and for this reason some courts have refused to allow an adoptive parent to release.

A. Statutory Basis

*See Section 6.6 for information on the legal rights and obligations of parents.

Adoptive parents "stand in the place of a parent or parents to the adoptee in law in all respects as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents."* MCL 710.60(1).

*For more information on releases and the exceptions to the general rule that a parent may release his or her parental rights, see Sections 2.1–2.5.

A parent may release his or her parental rights to his or her child.* MCL 710.28(1)(a). There are three exceptions to this rule:

- the parent's parental rights to the child have already been terminated,
- a guardian has been appointed for the child, or
- a guardian has been appointed for the parent.

MCL 710.60(1) provides that an adoptive parent stands in the place of a parent and MCL 710.28(1)(a) allows a parent to release a child for the purposes of adoption. Therefore, an adoptive parent may release an adopted child for adoption.

B. Considerations for the Court

When determining whether or not to allow an adoptive parent to release a child for adoption, the following questions may be of some guidance:

- What is in the child's best interests?*
- Have supportive services been utilized?
- Have temporary out-of-home placements been tried?
- Has a psychological evaluation of the child been conducted?

*See Section 1.4 for information on the "child's best interests."

If the court permits the adoptive parents to release the child, the court should provide supportive services to the child and offer supportive services to the parents and their other children, if any exist.

If the court finds the release to be in the best interests of the child, the court may accept the release. If the court does not find that the best interests of the child are served by the release, then the court may *not* accept the release. MCL 710.29(6) and *In re Buckingham,* 141 Mich App 828, 837 (1985).